(3)

No. 01-809

Supreme Court, U.S.
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In The

Supreme Court of the United States

LEAH E. MCKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY OF PETITIONER

This is a case involving personal injuries from an automobile accident near Snoqualmie Pass, WA, in April 1995, in which the facts as related in the petition for certiorari, the inability to appeal for lack of a record, and the underlying interests, permanent and potentially disabling injuries, have not been disputed by Mutual of Enumclaw.

The appeal from an arbitration proceeding, as provided for under state law in this case, was terminated by the state courts without a record on the rationale that a record is not required when a court reviews arbitration trial proceedings under state law, and that the lack of a record is irrelevant in these proceedings. The state courts denied the appeal despite petitioner's arguments of constitutional infirmity in the application of state law as the basis for dismissing the appeal, and over her arguments under controlling state decisions which conflict with the result. This cooperative of cases have integrated the principles of this Court's due process and equal protection cases, and have decisively held that a trial record is required in order to assure a complete judicial review. Our petition points out that, as it concerns the right to a record under state law, the safeguards of judicial review in appeal proceedings through the protections which state law provides against arbitrary deprivations of property, are removed by state court rulings which eliminate the right to a record for purposes of appeal and obtaining an effective judicial review when that right is provided for under state law, and under this Court's decisions in the *M.L.B.*, *Boddie*, *Mayer*, and *Griffin* cases. (Petition, pgs. 15-17, 24).

Mutual of Enumclaw's brief opposing certiorari veils the merits with ill conceived arguments that are in themselves irrelevant to the constitutional issues that are before this Court. Prominently, it ignores the historical

lineage of authorities that have long recognized the paramount and uncompromising importance of a record for purposes of appeal and obtaining appellate review under state and federal law; it ignores the due process arguments and decisions in the *M.L.B.*, *Boddie*, *Mayer*, *Draper* and *Griffin* cases entirely; while also ignoring Washington state court appellate decisions on this issue in *Dependency of Grove*, *Parkridge*, *Barrie*, *Larson*, and *Woods* which have in the main incorporated the principles of *Boddie*, *Draper* and *Griffin* into state law; and it ignores the equal protection arguments and decisions in *Lindsey* and *Logan* almost completely.

Mutual of Enumclaw has written at some length with misstated argument on issues that have no bearing on the constitutional issues that are before the Court, and has almost entirely failed to come to grips with petitioner's arguments in her petition for certiorari. Its arguments on the merits consist of three diversionary themes. The first concerns the contention of invited error, but Mutual of Enumclaw neglects to mention that this was rejected on a motion to dismiss the appeal below, and was not mentioned by the Court of Appeals in its opinion affirming the denial of the motion to vacate for lack of a record in this case. (Pet. App. D, 1, attached; Pet. App. A, petition). The second involves the argument that "plaintiff's constitutional arguments are frivolous," to the extent that the cases cited in the petition stand for the proposition that criminal defendants are entitled to have court proceedings recorded, that those considerations do not apply to an arbitration agreement, and "no case says otherwise." (Br. in Opp. 8). The argument is in itself frivolous because the *Dependency of Grove*, *Barrie*, and *Woods* cases, and the integration of the *Griffin*, *Draper*, and *Boddie* principles into state law authoritatively and credibly refute this insubstantial and infirm contention. Equally important, these cases stand for the basic precept stated in *Boddie*

that due process "requires . . . a meaningful opportunity to be heard." (Petition, pgs. 15-17 & 24).

The third argument, according to Mutual of Enumclaw, is that its policy states that the "UIM award is binding," that RCW 7.04 does not have any language on the right to appeal an arbitration award, and that the appeal was properly denied. (Br. in Opp. 8-9). The argument is again frivolous because RCW 7.04.220 provides for appeals by any party from a "final order in a proceeding under this chapter . . . as from an order or judgment in any civil action." In no uncertain terms, the statute has a clear directive for appeals to the appellate courts as in any civil action. As set forth more fully below, none of these contentions provide any basis for denying the petition.

A. INVITED ERROR DOES NOT APPLY IN THIS CASE AND WAS REJECTED BELOW AS A BASIS FOR PRECLUDING PETITIONER'S ARGUMENTS FOR VACATING THE AWARD AND GRANTING HER A NEW TRIAL.

Mutual of Enumclaw's general discussion of invited error is tainted by the same error that infects the rest of its brief: the manifestly false premise that invited error precludes petitioner's constitutional arguments for vacating the arbitration award. This same argument was rejected on a motion to dismiss the appeal below (Pet. App. D, 1, attached; Respondent's Motion on the Merits, pgs. 2-4). It reechoed this argument in its brief on the merits (Respondent's Brief, pgs. 4-9), and it is persuasively telling, if not dispositive, that invited error is not mentioned by the Court of Appeals in the opinion, and that the principle has no application in this case.

Mutual of Enumclaw contends that the invited error doctrine precludes a party from claiming error when that error was never objected to until after the result was obtained, citing *Sdorra v. Dickinson*, 80 Wn. App. 695, 910

P.2d 1328 (1996), and *Agranoff v. Morton*, 54 Wn.2d 341, 340 P.2d 811 (1959) (overruled on other grounds by CR 50(b)). (Br. in Opp. 8-9). This statement of the rule and the quotations from these cases are misleadingly pulled out of context.

The doctrine of invited error is based on principles of estoppel or waiver of a right to take a position inconsistent with a position initially taken. *Graham v. Graham*, 41 Wn.2d 845, 851, 252 P.2d 313 (1953). Invited error arises when a party to an action requests a ruling which is allegedly erroneous and then seeks to claim error from the ruling on appeal. *Sandler v. U.S. Development Co.*, 44 Wn. App. 98, 103, 721 P.2d 532 (Div. I, 1986) (citing *Graham supra*, and holding that the failure to accurately calculate the amount of back salary due under the court's ruling is not invited error).

The cases cited by Mutual of Enumclaw come within this statement of the rule, and are unambiguously distinguishable on this basis. See *Agranoff v. Morton*, 54 Wn.2d 341, 345, 340 P.2d 811 (1959) (in an action for personal injuries, defendant admitted liability, but plaintiff requested an instruction on the issue of defendant's negligence; when the trial court asked plaintiff's counsel to take exceptions to the instructions, he approved of them completely, and thus it was not error for the trial court to fail to limit the jury to the issue of damages); *Sdorra v. Dickinson*, 80 Wn. App. 695, 701-03, 910 P.2d 1328 (Div. II, 1996) (the trial court's errors were invited by plaintiff who argued that the jury should not be permitted to consider contributory negligence on his claim or the defendant's claim, and that the case should be submitted to the jury on a one-party-takes-all basis; after the jury said that defendant should take all plaintiff objected, for the first time, to the trial court's erroneous adoption of his position; the effect of his conduct was to waive contributory negligence should the jury elect to award damages on defendant's claim); *Cerjance v. Kehres*, 26 Wn.

App. 436, 441, 613 P.2d 192 (Div. I, 1980) (a new trial cannot be granted under CR 59 for errors of law and a failure of substantial justice when the failure is attributable to erroneous instructions given without objection, however, with respect to issues that the trial court has reserved for decision, the restrictions on granting a new trial do not apply since the trial court has rendered no decision on these aspects of the case).

Under Washington law, cases involving the invited error doctrine involve errors (or alleged errors) in rulings which a party invited or induced the trial court to commit, and did not object to, but the principle is based on estoppel and waiver, and finds its application only when facts exist which raise an estoppel or a waiver of rights to object on appeal. See *Graham*, 41 Wn.2d at 851; see also *Davis v. Globe Machine*, 102 Wn.2d 68, 76-77, 684 P.2d 692 (1984) (in a pre-trial motion in limine, petitioner sought a ruling permitting evidence of an Alabama lawsuit in a similar accident, but excluding evidence of a defense verdict in the case; the trial court denied the motion and instructed the attorneys not to mention the accident, but petitioner's expert mentioned the accident in direct examination, and the court then permitted respondent to inquire into the result of the Alabama trial; held that a party cannot properly seek review of an alleged error which the party invited, and by allowing its expert to mention the accident, petitioner invited any error which might have occurred); *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 9-10, 970 P.2d 343 (Div. I, 1999) (JDFJ Corp., the lessor of property to International Raceway, argued on appeal that the trial court should not have reduced the damages awarded it by the amount spent by its lessee on removing timber and grading a parking lot on the property, however, JDFJ argued in the trial court that stumpage value is the sales price of the timber less the costs of tree removal, and the court took the timber sales price less the costs of tree removal in awarding damages; the

trial court's actions were in accord with JDFJ's request, and citing *Graham*, held that a party may not complain on appeal of error for which he is responsible or of rulings which he has invited the trial court to make); *Bellevue v. Kravik*, 69 Wn. App. 735, 738-40, 850 P.2d 559 (Div. I, 1993) (invited error precluded the City of Bellevue from arguing on appeal that evidence of improper motive in manipulating zoning to depress property values should have been excluded at trial – it resisted a motion by property owners to exclude evidence on the City's comprehensive plan review process arguing that evidence of the review process was necessary to show that the process was fair and that it had acted reasonably; the trial court denied the motion, however, Bellevue opened the door to the admission of evidence of its review process and invited any error in admitting that evidence); *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 786-87, 727 P.2d 687 (Div. I, 1986) (Willapa Trading argued that it was an abuse of discretion for the trial court to permit Wheeldon, its president, director, and sole stockholder, to act as its attorney at trial in the case, however, the record reflects that Wheeldon sought permission from the court to appear for himself and his wholly owned corporation, and if granting the permission was error, it was invited error which he cannot now use to gain relief on appeal).

This array of Washington cases represents a broad cross-section of cases in which invited error has been applied in appeals to preclude judicial review of alleged errors in rulings which a party invited or induced the trial court to commit, and did not object to below. They are summarized to show that invited error simply does not apply as a basis for precluding by estoppel or waiver the constitutional arguments on the absence of a record of trial proceedings in an arbitration as grounds for vacating the proceedings under RCW 7.04.160 for an error of law.

Under Washington law, estoppel is not favored and a party asserting estoppel must prove its elements by clear,

cogent and convincing evidence. See *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wn.2d 816, 831-32, 881 P.2d 986 (1994) (plaintiff is not estopped from bringing an assigned contract claim against the defendants – praise of a party's work and statements that a party does not intend to file a lawsuit against another party do not alone or in combination equal an affirmative promise not to sue); *Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 734-36, 853 P.2d 913 (1993) (estoppel has the effect of precluding a party from offering an explanation or defense that it would otherwise be able to assert; the law does not encourage this silence, and so demands from the party asserting estoppel the highest possible burden of persuasion).

Waiver, on the other hand, is the intentional and voluntary relinquishment of a known right, *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Waiver will not be inferred from doubtful or ambiguous factors, and must be established by unequivocal acts or conduct evidencing an intent to waive. *Hadaller v. Port of Chehalis*, 97 Wn. App. 750, 757, 986 P.2d 836 (Div. II, 1999).

There are simply no facts which raise an estoppel or a waiver by petitioner to object on appeal to the absence of a record. The record is empty of any positions, actions or statements by petitioner in the trial of this case that are inconsistent with arguments or positions taken on appeal, and there are no arbitrator actions in the proceedings that can be pointed to in reliance on prior positions or statements by petitioner as reflected in trial rulings and orders. See *Graham*, 41 Wn.2d at 851; *Colonial Imports*, 121 Wn.2d at 734-35. There also are no actions or conduct by petitioner or her counsel showing an intentional and voluntary relinquishment of rights to a record of proceedings. See *Jones*, 134 Wn.2d at 241-42. There were no rulings on this issue at trial, and the record is barren of any evidence showing an estoppel or waiver of rights to make these arguments on appeal in this case. It is significant

that this argument was rejected on a motion by Mutual of Enumclaw to dismiss the appeal below, and that it is not mentioned in the opinion. The weakness of the argument, which is the same here as it made below, is highlighted by these facts, and on any close scrutiny, disintegrates as a theory in the appeal. It is patently clear that the principle has no application in this case.

B. THE DECISION OF THE STATE COURTS IS IN CONFLICT WITH THE REASONING OF THIS COURT'S DUE PROCESS AND EQUAL PROTECTION CASES.

In its brief, Mutual of Enumclaw argues that "plaintiff's constitutional challenges are frivolous," and in support of this statement, offers the misty argument that the cases cited in the petition stand for the position that criminal defendants are entitled to have court proceedings recorded, that those considerations do not apply to an arbitration agreement, and "no case says otherwise." (Br. in Opp. 8). In particular, it fails to discuss any of the sources cited in the petition, and it may also be added that this argument is so manifestly untenable as to require little discussion beyond what has already been stated.

1) Due Process. Mutual of Enumclaw does not (and plainly could not) refute the consequential importance of state appellate decisions on this issue in the *Dependency of Grove, Parkridge, Barrie, Larson,* and *Woods* cases which have integrated the principles of *Boddie, Draper* and *Griffin* into state law in criminal and civil cases. As explained in the petition, this case is a reflection of *Griffin's* principle that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows persons with means in criminal cases to have appellate review except those who cannot pay for the records of their trials. As in *Griffin,* where the Court noted that

appellate review had become an integral part of the Illinois trial system for adjudicating the guilt or innocence of a defendant, 351 U.S., at 18, review by appeal in Washington has become a basic part of the system in criminal and civil cases, and is guaranteed by statute under state law (RCW 7.04.220). (Petition, pgs., 22-23). Once a State provides that right, said the Court in *Griffin*, it may not "bolt the door to equal justice," 351 U.S. at 24 (Frankfurter, J., concurring).

The emphasis in *Boddie* that "the rationale of *Griffin* covers this case," envisions that, consistent with *Griffin*, appellants with means, even if limited, cannot be denied a record of sufficient completeness to permit proper consideration of their appeals, and a complete judicial review to which they are entitled as a matter of due process. However evident the value of *Boddie's* holding as a safeguard against tyranny, in its example that due process "requires . . . a meaningful opportunity to be heard," 401 U.S., at 377, its value in this case is unmistakable.

The purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994). As in that case, the safeguards of judicial review in appeal proceedings through protections which state law provides against arbitrary deprivations of property, are removed by state court rulings which eliminate the right to a record for purposes of appeal when that right is provided for under state law, and under this Court's decisions in the *M.L.B.*, *Boddie*, *Mayer*, and *Griffin* cases. Established safeguards provided for under state and federal law have been removed in this case, and the denial of these protections violates the Due Process Clause of the Fourteenth Amendment.

2) Equal Protection. The basic submission on this issue is that as in *Lindsey*, where the double-bond requirement was found to heavily burden the statutory right to appeal, the interpretation of the statute, which nullifies the importance of and effectively denies a record to a party in appeal proceedings under the statute, heavily

burdens the right to appeal under RCW 7.04.220. The interpretation does not rationally advance the purposes of the statute (avoiding the formality, expense, and delay of the court system) because the statutory scheme clearly contemplates that parties may apply to the courts to confirm, vacate, or modify an award, and decisions interpreting the statute state that there are cases where the courts must review the evidence to determine whether the grounds for vacating an award are present, to ascertain the law on disputed issues, and where a record is necessary to discern whether there are errors of law in rulings that affect the award. (Petition, pgs. 21-22, and 29).

It should also be added that as in *Logan*, terminating potentially meritorious appeals in a random manner without a record, as in this case, on the rationale that a record is not required when a court reviews proceedings under RCW 7.04, and that the lack of a recorded transcript is irrelevant in these proceedings, when appeals under the statute are clearly considered and decided with such records, does not further these purposes, and is not rationally related to these ends. (Petition, pgs. 29-30).

The interpretation of the statute in this manner, which necessarily has the effect of dividing persons appealing under the statute into two distinct groups that are accorded very different treatment, is an arbitrary classification and a denial of equal protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 29, 2002

No. 01-809

In The

Supreme Court of the United States

LEAH E. MCKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

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On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

APPENDIX TO REPLY BRIEF

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

LEAH E. McKENZIE, Appellant, v. MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent.	No. 45634-2-I COMMISSIONER'S RULING DENYING MOTION ON THE MERITS

A motion on the merits to affirm was filed in this case under RAP 18.14(a). Reviewing the issues in light of *State v. Rolax*, 104 Wn.2d 129, 702 P.2d 1185 (1985), it appears that this case does not meet the criteria set out in RAP 18.14(e)(1). Accordingly, the motion should be denied. It further appears the case should be referred to a panel of judges for consideration without oral argument under RAP 11.6.

Now, therefore, it is hereby

ORDERED that the motion on the merits to affirm is denied. And, it is further

ORDERED that this case is referred to the next available judges' non-oral argument calendar. RAP 11.6.

Done this 12th day of September, 2000.

/s/ James R. Verellen
Court Commissioner